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VIA U.S. MAIL

The Honorable John Van De Kamp, Chair
California Commission on the Fair Administration of Justice
900 Lafayette St, Ste 608
Santa Clara, CA 95050

Re: Focus Questions for Hearings on the Administration of
the Death Penalty in California

Dear Chairman Van De Kamp and Members of the Commission:

I am writing to provide my views about Focus Questions 5, 6 and 7 on the Administration of the Death Penalty in California. Before doing that, however, let me briefly state my background.

Over the past 19 years, while being a partner who specializes in civil litigation in a large law firm, I have acted as appointed counsel in two death penalty cases at the federal habeas corpus stage, and my firm has done another case at that level and in state court. I took on the first case, *Karis v. Calderon*, in 1989, having been recruited by the Federal Defender of the Eastern District of California when the case first reached the federal court. Because no habeas investigation had been done in state court prior to that time, with the help of associates and staff I did that investigation as part of preparing the first federal court habeas petition. I then took the case back to the California Supreme Court to exhaust 29 new claims. Upon return to federal court, I took the case through an evidentiary hearing on four claims, presented those claims to the district court, obtained penalty phase relief and had that relief upheld by the 9th Circuit. I worked on the case for 14 years.

The second case I have been involved in is *Cooper v. Brown*. In late 2003 the Innocence Project of Northern California asked my firm to take over as counsel to obtain a stay of execution to file a new petition. After we filed our request, the 9th Circuit *en banc* stayed the execution and the granted the right to file a successor petition. I and other attorneys in the firm then filed the new petition in district court, and presented evidence at a 15 day evidentiary hearing. When the petition was denied, we then appealed to the 9th Circuit. While the 9th Circuit has affirmed the district court, our petition for rehearing *en banc* is currently under submission.



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In addition to these two cases, I also served as a founding director of the Habeas Corpus Resource Center, appointed by the Central California Appellate Project. I also have served as a member of the Selection Board for federal habeas corpus appointments in United States District Court for the Eastern District of California for over 10 years.

Given this background, and the fact that I am a civil litigation specialist and not a criminal lawyer, I will direct my comments in large part to answering these questions as they relate to the habeas corpus process, as it is with that phase that I am the most familiar. Let me comment, however, that in my view the best way to improve the administration of justice in death penalty cases at the trial court level would be to devote much more significant resources, both in terms of paying higher hourly rates for appointed counsel and increasing expense budgets for investigation, experts, and other necessary expenses. If that were to happen, many of the convictions and sentences that are ultimately reversed on direct appeal and in the habeas process would be avoided. Also, I feel that prosecutors must be encouraged not to charge so many 1st degree murder cases as capital cases. The death penalty must be reserved for the most unusually heinous crimes, not the ones where a prosecutor thinks he or she can get the death penalty or where local political expediency is a factor. Most important, there are simply too many special circumstances in California's death penalty statute. In effect, the number and breadth of the special circumstances have made virtually any 1st degree murder "death eligible," which results in too many cases being prosecuted as capital cases. I therefore suggest that you recommend that the legislature revise Penal Code section 190.2.

Now allow me to address questions 5-7. As to steps that should be taken to assure the prompt appointment of qualified lawyers at the habeas corpus stage, the easiest and most effective way would be to expand the size and number of lawyers and staff at the Habeas Corpus Resource Center. Lawyers there are properly trained, efficient and have the infrastructure and resources to properly pursue these cases.

To the extent private lawyers are needed, the HCRC is an invaluable resource for private lawyers who take cases that the HCRC cannot handle. The HCRC needs additional funding to provide that resource. In addition, funds need to be increased for private lawyers' training, investigation and hourly rates of pay. The current \$50,000 limit on investigation expenses and experts is woefully inadequate and needs to be at least doubled if fair administration of justice is the goal. By way of example, in the *Karis* case, my firm spent over \$270,000 in 1990's dollars in disbursements for investigation, expert witnesses and other necessary outlays. As to, hourly rates for private attorneys, they should be at a minimum \$250 per hour to allow for proper investigation, evidence preparation and legal research. Such rates would also encourage well trained lawyers to take a second case, which increases efficiency. Currently, where firms like



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mine have taken cases, the learning curve is so steep, and the pay is so low and the money available for investigation is so small, that such an engagement is considered essentially a *pro bono* endeavor, which makes it difficult to convince a firm to take another case. This must be avoided to insure cost effective but competent representation.

As to consistency of representation for state and federal habeas corpus proceedings in capital cases, of course consistency is necessary and in fact almost always a benefit, not only to fair administration, but to reducing costs. Therefore it makes sense for the Habeas Corpus Resource Center to continue into federal court with the cases it handles in state court. Funding for this can be provided in part by the HCRC applying to the federal courts for federal funds. But that will mean that the HCRC needs more lawyers and staff.

Similarly, for private attorneys who take the cases at the habeas level in state court, if they have been adequately paid and have been provided adequate expenses for investigation, these attorneys are more likely to take a case to the federal habeas level, and the process will be streamlined and more efficient. But private firms must be made aware of the commitment that they face: likely in excess of ten years. By way of example, in the *Karis* case, my firm devoted over 16,000 hours to the case. It is difficult to ask any lawyer to commit to such a task, but if he or she is to be asked, there must be adequate compensation.

As to whether funding and support services are adequate, I think my views have been adequately expressed above. We have too many capital sentences in California as a result of an overly broad death penalty statute. But if we must deal with these cases, and certainly the current backlog means we are going to have to deal with them for years to come, we must adequately fund the public agencies such as the HCRC as well as the private attorneys who take these cases in order to insure fair administration of justice.

Thank you for your service on this important Commission. If I can answer any questions, or you would like to have me appear in person before you, I would be honored to do so.

Yours truly,

Norman C. Hile

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